Supreme Court, U.S.
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No. 03-__

IN THE

Supreme Court of the United States

NEBRASKA CATTLEMEN, INC., *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in holding that the Beef Promotion and Research Act of 1985 ("Beef Act"), 7 U.S.C. §§ 2901 *et seq.*, and regulations promulgated thereunder—which impose assessments on beef producers and importers to fund research, education, and promotional activities carried out by special administrative bodies created by Congress for the express purpose of furthering important governmental objectives under the direct supervision and control of the Secretary of Agriculture—are "unconstitutional and unenforceable."

2. Whether, even assuming that the Eighth Circuit correctly held unconstitutional the use of assessments to fund generic advertising under the Beef Act, the court erred in upholding a nationwide injunction that prohibits the collection of any assessments under the Act, even to fund research and education activities respondents did not challenge.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners in this case are Nebraska Cattlemen, Inc. ("NCI"), Gary Sharp, and Ralph Jones. NCI is a nonprofit association representing Nebraska breeders, ranchers, and feeders, as well as county and local cattlemen's associations. NCI has no parent corporations and has issued no stock.

This case arises out of two appeals consolidated in the Eighth Circuit below: *Livestock Marketing Ass'n, et al.* v. *United States Dep't of Agric., et al.* (No. 02-2769), and *Livestock Marketing Ass'n, et al.* v. *United States Dep't of Agric., et al.* (No. 02-2832). Petitioners were appellants in No. 02-2832; the United States Department of Agriculture, Ann Veneman (in her official capacity as the Secretary of Agriculture), and the Cattlemen's Beef Promotion and Research Board were appellants in No. 02-2769. Appellees in both cases (and respondents here) were Livestock Marketing Association, Western Organization of Resource Councils, Robert Thullner, Johnny Smith, Ernie J. Mertz, John Willis, Pat Goggins, Herman Schumacher, Jerry Goebel, and Leo Zentner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Nebraska Cattlemen, Inc. ("NCI"), Gary Sharp, and Ralph Jones respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 335 F.3d 711 and reproduced at 1a in the appendix ("App.") to the petition for certiorari filed by the Solicitor General seeking review of the same judgment on behalf of the Federal defendants in this case. The opinion of the District Court is reported at 207 F. Supp. 2d 992 and reproduced at App. 31a.

JURISDICTION

The judgment of the Eighth Circuit was entered on July 8, 2003. App. 1a. On October 16, 2003, over the dissents of two judges, the Eighth Circuit denied a timely petition for rehearing en banc. App. 62a. On January 5, 2004, Justice Thomas extended the time for filing a petition for certiorari to and including February 13, 2004. The jurisdiction of the Eighth Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech * * * . [U.S. Const. amend. I.]

The relevant provisions of the Beef Promotion and Research Act of 1985, 7 U.S.C. §§ 2901 *et seq.*, and the regulations promulgated thereunder are reproduced at App. 63a-119a.

INTRODUCTION

The Eighth Circuit in this case declared "unconstitutional and unenforceable" an Act of Congress—the Beef Promotion and Research Act of 1985 ("Beef Act"), 7 U.S.C. §§ 2901 *et seq*. App. 28a. The Beef Act requires cattle producers and importers to pay a one dollar assessment (or "checkoff") on each head of cattle sold in the United States to fund research, education, and promotional activities—including generic advertising—intended to "strengthen the beef industry's position in the marketplace" and boost "the general economy of the Nation." 7 U.S.C. §§ 2901(a)(4), (b). To achieve these important governmental objectives, Congress created two special administrative bodies—the Cattlemen's Beef Promotion and Research Board ("Beef Board") and the Beef Promotion Operating Committee ("Operating Committee")—

to carry out a "coordinated program of promotion and research" under the direct supervision and control of the Secretary of Agriculture. *Id.* § 2901(b).

For more than 15 years, the Beef Board and Operating Committee have developed and implemented research, education, and promotional projects in accordance with their express statutory mandate. Promotional activities conducted by the Board and Committee include generic advertising, such as the well-known "Beef. It's What's For Dinner" ad campaign. Research and education projects have dealt with such topics as food-borne pathogens (including *E. coli*, salmonella, and listeria), the proper handling of beef products, nutrition and health, and cattle diseases, including so-called "mad cow" disease or bovine spongiform encephalopathy ("BSE"). The Board and the Committee's activities have benefited individual producers, the beef industry as a whole, and the public and the Nation's economy in general. Recent events involving the discovery of a BSE-infected cow in the United States both underscore and heighten the national importance of the research, education, and promotional activities conducted under the Beef Act.

The Eighth Circuit declared the Beef Act unconstitutional in its entirety on the ground that the First Amendment to the Constitution precludes the imposition of mandatory assessments on cattle producers and importers to fund generic advertising. On two previous occasions, this Court has granted review of decisions declaring unconstitutional assessments under similar regulatory programs. In *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 477 (1997), this Court held that mandatory assessments to fund generic advertising under a marketing program for California tree fruit survived First Amendment scrutiny as "a species of economic regulation." Conversely, in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), the Court (over the dissents of Justices O'Connor, Ginsburg, and Breyer) held that mandatory assessments to fund generic advertising under

the Mushroom Promotion, Research, and Consumer Information Act ("Mushroom Act"), 7 U.S.C. § 6101 *et seq.*, failed to pass muster under the First Amendment.

Significantly, the *United Foods* Court specifically declined to consider the argument that the generic advertising at issue was "government speech" because the argument had not been raised below. *See* 533 U.S. at 416-417. The government speech doctrine is based on the principle that "when [the government] is the speaker or when it enlists private entities to convey its own message * * * it is entitled to say what it wishes." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). The generic advertising conducted under the Beef Act—prescribed in the first instance by Congress and formulated and communicated under the direct supervision and control of the Secretary of Agriculture by special administrative bodies created by Congress for the express purpose of furthering important governmental objectives—is government speech. Under the government speech doctrine, the generic advertising does not violate the First Amendment because it does not even implicate the First Amendment.

Both petitioners and the Federal defendants in this case defended the constitutionality of the Beef Act on the ground that the generic advertising conducted thereunder is government speech. The Eighth Circuit held, however, that the government speech doctrine does not immunize the compelled funding of generic advertising under the Beef Act from First Amendment challenge. In its view, "government speech cases and compelled speech cases * * * are fundamentally different," and never the twain shall meet. App. 17a. According to the Eighth Circuit, the government speech doctrine applies *only* in cases challenging the government's "choice of content," not in cases challenging the government's compelled funding of speech. *Id.*

The Eighth Circuit's conclusion is not only fundamentally flawed, but contrary to this Court's precedents on the government speech doctrine. As the Court has made clear, a fundamental principle of the government speech doctrine is that the government may compel funding of its *own* speech without implicating the First Amendment. *See, e.g., Board of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 229 (2000) (the government may spend "funds raised * * * for speech and other expression to advocate and defend its own policies"). Thus, the Court has specifically applied the government speech doctrine in a case involving the compelled funding of speech. *See Keller* v. *State Bar of Cal.*, 496 U.S. 1, 10-13 (1990).

The Eighth Circuit's decision is also contrary to this Court's precedents on the proper scope of injunctive relief. Although this Court has held that "[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979), the Eighth Circuit upheld a nationwide injunction against the further collection of *any* assessments under the Beef Act, even to fund research and education activities the District Court below acknowledged were "unobjectionable." App. 57a. Thus, even assuming the Eighth Circuit correctly concluded that the generic advertising under the Beef Act is unconstitutional, the court had no basis whatsoever to bar the collection of funds for the other important regulatory objectives of the Act.

The conflicts between the Eighth Circuit's decision and this Court's precedents is reason alone to grant certiorari. *See* S. Ct. R. 10(c). The Eighth Circuit's decision, however, also conflicts with that of another federal circuit, presenting another compelling basis for certiorari. *See* S. Ct. R. 10(a). In *United States* v. *Frame*, 885 F.2d 1119, 1133-37 (3d Cir. 1989),), *cert denied*, 493 U.S. 1094 (1990), the Third Circuit held that the Beef Act survives scrutiny under the commercial speech test articulated by this Court in *Central Hudson*

Gas & Electric Corp. v. *Public Service Comm'n*, 447 U.S. 557 (1980). Subsequently, in *Wileman*, this Court questioned whether the *Central Hudson* test even applies in cases "involving the compelled funding of speech." 521 U.S. at 474 n.18. In *United Foods*, however, the Court declined to consider whether the generic advertising in question survived scrutiny under *Central Hudson* because the issue had not been raised in that case. *See* 533 U.S. at 410. When presented below with the argument that the generic advertising under the Beef Act is valid under *Central Hudson*, the Eighth Circuit held—in direct conflict with the Third Circuit in *Frame*—that the Beef Act fails to survive scrutiny under *Central Hudson*. *See* App. 22a-28a. It did so, moreover, by applying a strange amalgam of *Central Hudson* and other precedents that lacks any foundation in this Court's First Amendment jurisprudence.

Wholly apart from the foregoing conflicts, certiorari is warranted by the undeniable national importance of the question presented. The Eighth Circuit has declared "unconstitutional and unenforceable" an important government program, App. 28a, while at the same time cast doubt on the constitutionality of scores of similar regulatory programs. In the wake of *United Foods*, numerous First Amendment challenges have been mounted against such programs, and considerable uncertainty and confusion exists in the lower courts over the issues left open by that decision. The Court should grant certiorari to eliminate that uncertainty and confusion, resolve the conflicts created by the Eighth Circuit below, and determine whether "the exercise of the grave power of annulling an Act of Congress" was justified here. *United States* v. *Gainey*, 380 U.S. 63, 65 (1965).

STATEMENT OF THE CASE

Statutory and Regulatory Background. Recognizing that "the production of beef and beef products plays a significant role in the Nation's economy," and that "the mainte-

nance and expansion of existing markets for beef and beef products are vital to * * * the general economy of the Nation," Congress enacted the Beef Act to "strengthen the beef industry's position in the marketplace" through a "coordinated program of promotion and research." 7 U.S.C. §§ 2901(a)(2), (4), (b). To accomplish these important governmental objectives, the Act provides for the establishment and selection of the Beef Board and the Operating Committee to administer the program. *Id.* §§ 2903(b), 2904(1), (4)(A).[1]

The Board and the Committee administer the program under the direct supervision and control of the Secretary of Agriculture. The Secretary appoints all the members of the Board, *see* 7 U.S.C. § 2904(1), half the Committee's members, *see id.* § 2904(4)(A), and has the power to remove all members of both, *see* 7 C.F.R. § 1260.213. *All* plans and projects developed under the Act must be submitted to the Secretary for approval. 7 C.F.R. §§ 1260.168(e), 1260.169. The Secretary must also approve annual budgets submitted by the Board and the Committee. 7 U.S.C. §§ 2904(2)(D), (4)(C); 7 C.F.R. § 1260.150(g). The Committee must also obtain the Secretary's approval to enter into contracts for implementing and carrying out the promotional and research activities authorized by the Act. 7 U.S.C. § 2904(6); 7 C.F.R. § 1260.168(b),(f).

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[1] The Act directs the Secretary of Agriculture to promulgate a "beef promotion and research order" ("Beef Order"). 7 U.S.C. § 2903(b). The Beef Order and related regulations were issued by the Secretary in 1986. *See* 7 C.F.R. Part 1260. Within 22 months after the Beef Order was issued, the Secretary was required to conduct a referendum among producers and importers, and to continue the Order only if approved by a majority of producers voting in the referendum. 7 U.S.C. § 2906(a). On May 10, 1988, the referendum was conducted and approved by nearly 80% of voting producers. *See* 8th Cir. J.A. 580.

The books and records of the Board and Committee are subject to inspection and audit by the Secretary, and the Board and the Committee must prepare such reports as the Secretary may prescribe. 7 U.S.C. § 2904(7). The Board and the Committee must also submit to the Secretary information as requested, and must give the Secretary notice of their meetings so that the Secretary or her representative may attend. 7 C.F.R. §§ 1260.150(m), (o), 1260.168(h), (i). In short, as the uncontroverted evidence in this case established, the Secretary exercises extensive oversight and control over all aspects of the checkoff program.

The research, education, and promotional activities authorized by the Act are funded by assessments—or "checkoffs"—paid by producers and importers in the amount of one dollar per head of cattle sold in the United States. 7 U.S.C. §§ 2904(4)(B), (8). The Act expressly prohibits the use of assessments collected by the Board for "influencing governmental action or policy, with the exception of recommending amendments to the order." *Id.* § 2904(10). With the Secretary's approval, the Board may invest such funds, pending disbursement, in certain obligations and interest-bearing accounts. *Id.* § 2904(9). Any patents, copyrights, inventions, or publications developed through the use of checkoffs are "the property of the U.S. Government." 7 C.F.R. § 1260.215(a).

District Court Proceedings. The individual respondents are cattle producers who do not wish to pay the assessments required by the Beef Act. In December 2000, they (and two advocacy organizations) brought this action against the United States Department of Agriculture ("USDA"), the Secretary of Agriculture, and the Beef Board, challenging the Secretary's implementation of the checkoff program on various grounds. Petitioners—two South Dakota cattle producers and a nonprofit association representing Nebraska cattle producers and local cattlemen's associations—intervened to defend the checkoff program. On June 25,

2001, while this case was pending, this Court issued its decision in *United Foods* holding that the imposition of assessments to fund generic advertising under the Mushroom Act violated the First Amendment.

Respondents thereafter amended their complaint to allege that the generic advertising conducted under the Beef Act also violates the First Amendment. On cross-motions for summary judgment, petitioners and the Federal defendants argued that the generic advertising under the Beef Act is government speech, and thus free from First Amendment scrutiny. In addition, petitioners and the Federal defendants argued that, even if the advertising is not considered government speech, it is nonetheless constitutional under *Central Hudson* as a valid regulation of commercial speech, and under *Wileman* as "a species of economic regulation," *Wileman*, 521 U.S. at 477, that simply "[does] not raise First Amendment concerns." *United Foods*, 533 U.S. at 415. The District Court denied the parties' summary judgment motions, and scheduled a trial on respondents' First Amendment claims.

The District Court's Decision. Following a two-day trial at which petitioners and the Federal defendants presented substantial, unrebutted evidence concerning the Secretary's extensive oversight and control of the checkoff program, the District Court issued a decision striking down the Beef Act in its entirety. App. 31a. The court recognized that in *Wileman*, this Court had upheld "a similar generic advertising program" for California tree fruit. App. 40a. Nevertheless, the court concluded that the outcome in this case was dictated by *United Foods*, not *Wileman*. The court noted that the *United Foods* Court had distinguished *Wileman* on the ground that the assessments in that case were ancillary to a broader regulatory scheme, whereas the assessments in *United Foods* were not. App. 44a. Without examining any of the numerous statutes regulating the beef industry, the court concluded that "[b]eef producers and sellers are not in

any way regulated to the extent that the California tree fruit industry is regulated," and that the assessments under the Beef Act therefore were "not germane to a larger regulatory purpose." App. 47a-48a. Accordingly, the court held, "[t]he beef checkoff is unconstitutional in violation of the First Amendment." App. 48a.

In the course of reaching its decision, the court declined to apply the *Central Hudson* test for commercial speech to the generic advertising at issue, concluding that this Court had "rejected" the use of that test in *Wileman* "because [*Central Hudson*] involved a restriction on commercial speech rather than the compelled funding of speech involved in the California tree fruit marketing orders." App. 40a. The court also rejected the argument that the generic advertising conducted under the Beef Act is government speech and therefore not constrained by the First Amendment. After initially expressing doubt as to the existence of the government speech doctrine, *see* App. 49a-51a—despite numerous pronouncements by this Court on the matter—the District Court went on to conclude that the Beef Board was "more akin" to a private entity than a government agency, and thus not engaged in government speech. App. 51a.

The court acknowledged that "the Board * * * [was] created by statute to further the policy of the United States Congress to promote beef for the purpose of strengthening the beef industry's position in the marketplace," and that "the Secretary must approve the appointment of those nominated." App. 54a. Without citation to the record, the court concluded, "based upon the evidence," that "such approval is merely *pro forma*." App. 55a. The court also acknowledged that "all projects are submitted to the Secretary for final approval to spend checkoff funds," and that "USDA employees attend every meeting of the Board, the Operating Committee, and the [Board's] Executive Committee." *Id.* Again without citation to the record, the court stated that a USDA official had "admitted that USDA oversight is more akin to

ministerial review of the Board's compliance with the Order." *Id.* The court also found it significant that the Board's activities were funded by special assessments, rather than general tax revenues, and that the Board's advertisements bear the Board's copyright, and not "the distinctive notice from the Government Printing Office." App. 54a, 56a.

The court then issued an order striking down the entire Beef Act and enjoining the further collection of *any* assessments under the Act. Even though assessments collected under the Act are also used to fund research and education projects—activities the District Court itself acknowledged were "unobjectionable"—the court refused to limit its injunction to the collection of assessments to fund promotion, stating that "it would be impossible to separate what portion of any individual's checkoff assessment is related to the objectionable generic beef promotion activities." App. 57a. The court also refused to limit relief to the five individual respondents found to have standing in this case, reasoning that to do so "would only encourage numerous other producers, importers, and other sellers of beef on the hoof to file additional lawsuits in this and other federal jurisdictions." App. 58a.[2]

The Eighth Circuit's Decision. The Eighth Circuit affirmed. The court began its analysis by recognizing that "[t]he government speech doctrine has firm roots in our system of jurisprudence." App. 15a. Under its view of the doctrine, however, "when the government speaks, it is [not] entirely immune from all types of First Amendment free speech claims." App. 16a. Rather, the court opined, "when the government speaks in its role as the government, it may

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[2] The Eighth Circuit subsequently issued a stay of the District Court's order and judgment pending appeal. Following the denial of rehearing en banc, the Eighth Circuit issued a stay of its mandate pending the filing of a petition for certiorari and the final disposition of the case by this Court.

be immune from First Amendment challenge *based upon its choice of content*." App. 16a-17a (emphasis added). In this case, the court observed, respondents "are challenging the government's authority to compel them to support speech with which they personally disagree," and not "the content of government speech." App. 17a. "The two categories of First Amendment cases—government speech cases and compelled speech cases—are fundamentally different." *Id.*

Because respondents asserted a First Amendment right "to protect themselves from being compelled to pay for * * * speech[] with which they disagree," the court concluded that their claim was governed by this Court's "compelled speech line of cases," including *Keller* v. *State Bar of California*, 496 U.S. 1 (1990), and *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). App. 18a-19a. Yet no sooner had the court identified that line of cases as controlling, when the court stated that "we must decide what constitutional standard applies when compelled subsidies are used to fund generic commercial advertising." App. 19a.

The court noted that the District Court had declined to apply the *Central Hudson* test because this Court had declined to apply it in *Wileman*. App. 20a. The Eighth Circuit, however, "disagree[d]" with the District Court's reasoning "because it fails to account for the more recent pronouncements in *United Foods*." App. 21a. There, the Eighth Circuit observed, this Court "went out of its way" to distinguish the California tree fruit industry from the "more commercially competitive" mushroom industry. *Id.* The Eighth Circuit thus "infer[red] that, had the government relied upon *Central Hudson* in *United Foods*, the Supreme Court would have adapted the *Central Hudson* test to the circumstances of that case." *Id.* The Eighth Circuit recognized that *Central Hudson* "involved a restriction on speech, while the present case involves compelled speech." App. 21a-22a (footnote omitted). In its view, however, "it is more significant that *Central Hudson* and the case at bar both

involve government interference with private speech in a commercial context." App. 22a. Accordingly, the Eighth Circuit "now adapt[ed] the *Central Hudson* test to [respondents'] First Amendment claim." *Id.*

Addressing the first prong of the *Central Hudson* test—whether the government's interest in the speech at issue is "substantial"—the court declared, "[a]t this juncture, we may now revisit appellants' government speech arguments." App. 23a. "[C]onsistent with the district court's conclusion that the advertising in question is not government speech," the court concluded, "we consider the substantiality of the government's interest to be highly doubtful." App. 24a. Nevertheless, the court held, "even assuming that the government's interest is substantial," it must be "sufficiently substantial to justify the infringement upon [respondents'] First Amendment rights." *Id.*

Thus, the court held, "[a]t this point, the analysis turns largely upon the nature of the speech in question." *Id.* The court then turned back to *Keller* and *Abood*, noting that in those cases this Court "considered the nature of the speech at issue in terms of whether or not it was *germane* to the institutional purposes which justified the mandatory dues in the first place." *Id.* (emphasis in original). The court also noted that, more recently, in *Board of Regents of the University of Wisconsin System* v. *Southworth*, *supra*, this Court "determined that the germaneness standard was 'unmanageable' in the context of a state university," and held instead that " '[t]he proper measure, and the principal standard of protection for objecting students * * * is the requirement of viewpoint neutrality in the allocation of funding support.' " App. 25a (alterations in original) (quoting *Southworth*, 529 U.S. at 233).

The Eighth Circuit observed that this Court "has repeatedly warned that, when assessing the nature of speech in the compelled speech context—whether based upon germane-

ness, viewpoint neutrality, or some other benchmark—the analysis often comes down to a difficult line-drawing exercise." App. 26a. The court concluded, however, that "we need not, ourselves, engage in such a line-drawing exercise," for "[t]he Supreme Court has already drawn the relevant line for us" in *United Foods*. *Id.* Stating that it was "duty-bound to reconcile and apply the precedents of the Supreme Court to the best of our ability," the court concluded that "[t]he beef checkoff program is, in all material respects, identical to the mushroom checkoff program." App. 28a. Thus, the court held, "the government's interest in protecting the welfare of the beef industry * * * is not sufficiently substantial to justify the infringement on [respondents'] First Amendment free speech right." *Id.* Accordingly, the court held, the Beef Act is "unconstitutional and unenforceable." *Id.* The court then went on to uphold the District Court's nationwide injunction enjoining the further collection of *any* assessments under the Beef Act, holding that Congress's omission of a severability clause in the 1985 amendment of the Act constituted a "clear expression" of non-severability such that "no remaining aspects of the Act can survive." App. 29a.

Both petitioners and the Federal defendants filed timely petitions for rehearing en banc. Although Judges Murphy and Melloy voted to grant rehearing, the petitions were denied. App. 62a. This petition follows.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S DECISION IS CONTRARY TO DECISIONS OF THIS COURT.

A. The Eighth Circuit's Decision Is Contrary To This Court's Precedents On The Government Speech Doctrine.

The Eighth Circuit began its analysis in this case by correctly recognizing that "[t]he government speech doctrine has firm roots in our system of jurisprudence." App. 15a. But

the court quickly veered off course, holding that "when the government speaks, it is [not] entirely immune from all types of First Amendment free speech claims." App. 16a. In the Eighth Circuit's view, the government speech doctrine applies *only* in cases involving challenges to the government's "choice of content," and not in cases involving the compelled funding of speech. App. 17a. The latter category of cases, the court determined, involve "a form of government interference with private speech." *Id.* (quotation omitted). Thus, government speech cases and compelled funding of speech cases, the court held, "are fundamentally different." *Id.* Because respondents have "challeng[ed] the government's authority to compel them to support speech with which they personally disagree," the court concluded that the government speech doctrine does not apply in this case. *Id.*

The Eighth Circuit's conclusion is contrary to this Court's precedents on the government speech doctrine. As the Court has made clear, "when [the government] is the speaker * * * *it is entitled to say what it wishes*." *Rosenberger*, 515 U.S. at 833-834 (emphasis added); *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001) ("viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker"). Thus, contrary to the Eighth Circuit's conclusion, "when the government speaks," it is in fact "*entirely* immune from all types of First Amendment free speech claims." App. 16a (emphasis added). The First Amendment limits the government's interference with *private* speech; it does not limit the government's *own* speech.

The Eighth Circuit's decision creates a false dichotomy between cases involving the compelled funding of speech and those involving government speech. The government speech doctrine is premised on the principle that the government may compel funding of its "speech and other expression to advocate and defend its own policies," *Southworth*,

529 U.S. at 229, for the government's speech is necessarily paid for by citizens who may or may not agree with the government's message. *See id.* at 229 (the government may spend "*funds raised* * * * for speech and other expression to advocate and defend its own policies") (emphasis added); *Rosenberger*, 515 U.S. at 833 ("when the government appropriates *public funds* to promote a particular policy of its own it is entitled to say what it wishes") (emphasis added). The government's use of "funds raised" for its *own* speech is not in any sense "a form of government interference with private speech"; in using such funds to add its *own* voice to the marketplace of ideas, the government neither prohibits nor compels speech by *others*.[3]

If the Eighth Circuit were correct, *every* citizen—including smokers who object to the government's anti-smoking ads, pacifists who object to the government's promotion of the armed services, and isolationists who object to the government's foreign policy—would have the right to insist that his or her tax dollars not be used to support programs or policies with which he or she disagreed.[4] As this Court explained in *Keller*, *supra*, however, that is decidedly not the case:

> Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. * * * If every citizen were to have a right to insist that no one paid by public funds ex-

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[3] The government's use of "funds raised" to engage in its own speech is by no means unchecked. As in the case of any other government program, the public—through the democratic process—may call for the end of the program, or insist on a different message.

[4] Moreover, if the Eighth Circuit were correct, a citizen could influence the government's "choice of content"—an area the Eighth Circuit believed was "immune from First Amendment challenge"—simply by challenging the government's right to compel funding of its message. App. 16a-17a.

> press a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed. [496 U.S. at 12-13.]

Cf. United States v. *Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

Indeed, in *Keller*, the Court specifically applied the government speech doctrine in the compelled funding context. In that case, members of the State Bar of California challenged the Bar's use of their dues to finance certain ideological and political activities to which they objected.[5] The Bar contended that it was a government entity and that its expressive activities were thus immune from First Amendment inquiry. Because the Court concluded that the Bar was not like a typical government agency, which "[is] expected as a part of the democratic process to represent and to espouse the views of the majority of [its] constituents," the Court held that the Bar's expressive activities were not government speech. 496 U.S. at 12-13. Yet if the Eighth Circuit were correct that the government speech doctrine does not apply in the compelled funding context, the Court would never have engaged in such an inquiry. The Eighth Circuit's decision, therefore, cannot be reconciled with this Court's decision in *Keller*.

Nor can the Eighth Circuit's decision be squared with the Court's decision in *Southworth*, *supra*. The Eighth Circuit cited *Southworth* as support for its conclusion that govern-

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[5] The Bar was alleged to have been engaged in such openly political activities as "endors[ing] * * * gun control * * * [and] nuclear weapons freeze initiative[s]." 496 U.S. at 15. The Beef Act expressly prohibits spending for such political activities, *see* 7 U.S.C. § 2904(10), and limits permissible speech activities to commercial advertisements promoting beef.

ment speech and compelled funding of speech cases are "fundamentally different." App. 17a-18a. Like *Keller*, however, *Southworth* also demonstrates that the government speech doctrine applies in the compelled funding context. In *Southworth*, a group of students brought a First Amendment challenge to a mandatory student activity fee imposed by a public university and used to support organizations engaging in political and ideological speech to which they objected.

At the outset, the Court observed that "[t]he government, as a general rule, may support valid programs and policies *by taxes or other exactions* binding on protesting parties." 529 U.S. at 229 (emphasis added). Thus, the Court held, "[i]f the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might well be evaluated on the premise that the government itself is the speaker." *Id.* But "[t]he University having *disclaimed* [the] speech [as] its own," the case did not "raise the issue of the government's right * * * to use its own funds to advance a particular message." *Id.* (emphasis added). At the conclusion of its decision, the Court emphasized that it "ha[d] not held, or suggested, that when the government speaks the rules we have discussed come into play." *Id.* at 235. Rather, the court stated, if the case had involved the university's *own* speech, "the analysis likely would be altogether different." *Id.* (citing *Rust* v. *Sullivan*, 500 U.S. 173 (1991)).[6]

The Eighth Circuit interpreted this last statement to mean that government speech and compelled funding of speech cases are mutually exclusive. *See* App. 17a-18a. The court failed to recognize, however, that if the university had argued that the speech at issue was its *own*, the case would *still* have involved the compelled funding of speech. That is, the

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[6] The Court has interpreted *Rust* as holding that the government may "use[] private speakers to transmit specific information pertaining to its own program." *Rosenberger*, 515 U.S. at 833.

students' challenge would still have been to the compelled funding of speech to which they objected. Had the university argued that it was "us[ing] its own funds to advance a particular message," the analysis would have been "different" in that the Court would have considered whether the speech could be sustained "under the principle that the government can speak for itself"—in other words, as government speech. 529 U.S. at 229.

The Eighth Circuit's misunderstanding of the government speech doctrine appears to stem from its confusion of compelled funding of government speech with the government's compulsion of speech *by others*. This case, which involves the compelled funding of a government program by those who, in Congress's judgment, "most directly reap the benefits of the program[]," 7 U.S.C. § 7401(b)(2), is a far cry from those in which the government attempts to compel adherence to its own message, as was the case in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), where students were faced with expulsion and prosecution for failing to recite the Pledge of Allegiance, or *Wooley* v. *Maynard*, 430 U.S. 705 (1977), where motorists were required to bear on their own vehicle license plates an ideological state motto they found morally objectionable. For the government to compel political or ideological speech from the lips of a reluctant entity is worlds apart from compelling that entity to contribute financially to support government-supervised commercial speech, especially when that speech directly benefits the entity's own interests.

The Eighth Circuit's confusion is evident from its citation of *Wooley* to support its conclusion that the government speech doctrine does not apply in this case. *See* App. 23a n.9. In contrast to *Wooley*, no one here is being forced to carry the government's message. That is, no one is being asked to express his or her own belief that beef is "a valuable part of human diet." 7 U.S.C. § 2901(a)(1). The Eighth Circuit's reliance on *Wooley* is contrary to the Court's

decision in *Wileman*, where the Court found *Barnette* and *Wooley* and *all* the Court's "compelled speech case law * * * *clearly inapplicable*" to cases, like this, involving the compelled funding of a generic advertising program. *Wileman*, 521 U.S. at 470-471 (emphasis added).

B. The Eighth Circuit's Decision Is Contrary To This Court's Precedents On The Proper Scope Of Injunctive Relief.

This Court has held that "[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). The Eighth Circuit's decision striking down the Beef Act in its entirety is contrary to that established principle in two respects. *First*, the Eighth Circuit enjoined the collection of *any* assessments under the Beef Act, even to fund research and education activities which respondents did not challenge. *Second*, the Eighth Circuit upheld a nationwide injunction prohibiting the collection of assessments from *anyone*, not just the five individual respondents found to have standing here. *See* App. 37a. This is not a class action, and respondents have alleged only that the Beef Act violates *their* First Amendment rights. *See* 8th Cir. J.A. 41. Thus, even assuming that the Eighth Circuit correctly held that the imposition of assessments to fund generic advertising is unconstitutional, the court's decision goes far beyond what is necessary "to provide complete relief to the plaintiffs." *Yamasaki*, 442 U.S. at 702.

The Eighth Circuit's decision further contravenes this Court's admonition that "[a] court should refrain from invalidating more of [a] statute than is necessary." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987) (quotations and alterations omitted). As this Court has instructed, "[w]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the

act in so far as it is valid." *Id.* "The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Id.* (quotations omitted).

The Beef Act itself confirms that Congress would have intended the Act's research and education provisions to remain in force in the event its promotion provisions were invalidated.[7] The Act, after all, is entitled the "Beef Promotion *and* Research Act." Its purpose is to further important governmental objectives through "promotion *and* research." 7 U.S.C. § 2901(b) (emphasis added). The Act provides for the development of plans or projects of not only promotion and advertising, but "research, consumer information, and industry information." *Id.* § 2904(4)(B). Those latter initiatives are vitally important. As the record in this case reflects, checkoff dollars have long been used to fund research on and disseminate information about BSE and other food safety issues. *See* Tr. 198, 247-248, 299-301. Since the recent discovery of a BSE-infected cow in the United States,

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[7] The Beef Act does not contain a severability clause. As this Court has held, however, "[i]n the absence of a severability clause * * * Congress' silence is just that—silence—and does not raise a presumption against severability." *Alaska Airlines*, 480 U.S. at 686. The Eighth Circuit nevertheless concluded that Congress had "clear[ly] express[ed]" its intent that the entire Beef Act be stricken if a single provision were declared unconstitutional by "specifically delet[ing]" a pre-existing severability provision when it completely overhauled the Act in 1985. App. 29a. The court, however, failed to identify anything in the legislative history suggesting that the omission was deliberate. The annotation following 7 U.S.C.A. § 2901—which is all the court cited—states only that the provision " 'was omitted.' " App. 29a (quoting note following 7 U.S.C.A. § 2901).

checkoff dollars have played a significant role in educating the public about BSE. *See, e.g.*, BSEinfo.org, *at* http://www.bseinfo.org.

Finally, in upholding a nationwide injunction, the Eighth Circuit improperly allowed cattle producers who support the promotion conducted under the Beef Act to be "silenced by the dissenters." *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 773 (1961). At the very least, the Eighth Circuit should have limited the injunction to the collection of assessments from objecting producers, and then only as to an amount reflecting the percentage of checkoff funds used for promotional activities. *See id.* at 774 (holding that "dissent is not to be presumed" and that "[a]ny remedies * * * would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object"); *Abood*, 431 U.S. at 240-242 (discussing possible remedies in similar circumstances, including "the reduction of future exactions by the same proportion" of funds spent on objectionable speech).

II. THE EIGHTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS.

The Eighth Circuit's decision also directly conflicts with the Third Circuit's decision in *Frame* on the application of the *Central Hudson* test to the very same Act of Congress. Whereas the Third Circuit held that the Beef Act passes constitutional muster under *Central Hudson*, the Eighth Circuit held that it does not. *See* 885 F.2d at 1133-37; App. 22a-28a. This clear circuit conflict provides an independent reason to grant certiorari. *See* S. Ct. R. 10(a).[8]

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[8] The Tenth Circuit has also upheld the Beef Act under this Court's decision in *Wileman*. *See Goetz v. Glickman*, 149 F.3d

Under *Central Hudson*, the government must demonstrate that regulation of commercial speech (1) furthers a substantial government interest; (2) directly advances that interest; and (3) is not more extensive than necessary to serve that interest. 447 U.S. at 566. The Third Circuit held that the Beef Act survives scrutiny under the *Central Hudson* test because it in fact survives scrutiny under an even *stricter* First Amendment standard. *See* 885 F.2d at 1134 n.12; *see also id.* at 1133-37 (holding that Beef Act survives strict scrutiny under the standard articulated in *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984)). As the court concluded, "preventing the collapse of a vital sector of the national economy qualifies as a compelling state interest," and "requiring beef producers to contribute to the cost of commercial advertising intrudes upon speech * * * no more than necessary to achieve this goal." *Id.* at 1134 n.12.

Without even acknowledging the Third Circuit's decision in *Frame*, the Eighth Circuit concluded that the Beef Act did not survive scrutiny under *Central Hudson*. App. 22a-28a. Moreover, instead of applying *Central Hudson*'s straightforward criteria to the Beef Act—as the Third Circuit did in *Frame*—the court applied a bewildering amalgam of *Central Hudson* and other precedents that has no foundation in this Court's jurisprudence, or the First Amendment itself. *See supra* at 12-14; App. 22a-28a. This Court should grant certiorari to resolve this direct conflict between two federal

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1131, 1138-39 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999). Although the Tenth Circuit's decision was issued before this Court's decision in *United Foods*, this case is in fact closer to *Wileman* than *United Foods* in that the promotion conducted under the Beef Act—like the promotion conducted under the marketing orders in *Wileman*—is part of a "broader regulatory scheme," and accordingly "[does] not raise First Amendment concerns." *United Foods*, 533 U.S. at 412, 415. The Court's decision in *Wileman* thus provides another basis for upholding the Beef Act.

circuits on the proper application of the *Central Hudson* test in this important context.

III. THE EIGHTH CIRCUIT'S DECISION INVOLVES A RECURRING ISSUE OF UNDENIABLE NATIONAL IMPORTANCE.

Wholly apart from the conflicts engendered by the Eighth Circuit's decision, this case presents an issue of undeniable national importance. The Eighth Circuit has declared "unconstitutional and unenforceable" an Act of Congress. App. 28a. That alone presents a sufficient basis for granting certiorari. *See United States* v. *Bajakajian*, 524 U.S. 321, 327 (1998) (granting certiorari because court of appeals "invalidated a portion of an Act of Congress"); *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (granting certiorari "[b]ecause the Court of Appeals held an Act of Congress unconstitutional"); Robert L. Stern *et al.*, *Supreme Court Practice* 436 (8th ed. 2002) ("Decisions invalidating acts of Congress * * * are ordinarily sufficiently important to warrant Supreme Court review without regard to the existence of a conflict"). The significance of the question presented is underscored by the fact that this Court has *twice* granted review of decisions declaring unconstitutional assessments under similar regulatory programs, while expressly leaving open the government speech issue presented here. *See United Foods*, 533 U.S. at 408, 416-417; *Wileman*, 521 U.S. at 466-467 (granting certiorari to resolve conflict with *Frame*).

In striking down the Beef Act in its entirety, the Eighth Circuit invalidated an important government program that Congress expressly determined was "in the public interest." 7 U.S.C. § 2901(b). As the Third Circuit concluded in *Frame*, the Beef Act advances the "compelling state interest" of "preventing the collapse of a vital sector of the national economy." 885 F.3d at 1134 n.12. *See also id.* at 1134 (Beef Act passed to "prevent[] further decay of an already deterio-

rating beef industry"); Rod Smith, *Industry Officials See Domino Effect*, Feedstuffs, Aug. 13, 2001, at 1 (implementation of beef checkoff program "halted a 20-year beef demand erosion"). As recent events have demonstrated, the beef checkoff program is now as important as ever to the beef industry and the Nation's economy.[9]

Moreover, in declaring the entire Beef Act "unconstitutional and unenforceable," the Eighth Circuit cast doubt on the constitutionality of numerous similar federal and state programs that have been familiar features of the agricultural sector for years.[10] The Eighth Circuit's decision thus "encourage[s] wider non-compliance," and "engender[s] those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements." *United States* v. *Ruzicka*, 329 U.S. 287, 293 (1946) (upholding injunction requiring payments by handlers under agricultural marketing program).

Indeed, in the wake of *United Foods*, numerous First Amendment challenges have been brought against various

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[9] *See, e.g.*, Steve Raabe, *Groups Launch Ads to Counter Mad-Cow Publicity*, Denver Post, Jan. 20, 2004; *USDA Says Mad Cow Will Cut Cattle Prices*, L.A. Times, Jan. 13, 2004; *Mad Cow Could Keep Cattle Prices Lower for Months*, L.A. Times, Jan. 12, 2004; Paul Davidson, *Beef Processors Ease Production, Lay Off Workers*, USA Today, Jan. 2, 2004; Randy Fabi & Charles Abbott, *Worries Over Mad Cow Torpedo Cattle Prices*, The Star-Ledger, Dec. 31, 2003; Victoria Sizemore Long, *Mad Cow Case Darkens the Outlook for Cattle Futures*, Kansas City Star, Dec. 30, 2003; Suzanne McGee, *New Year Worry; Economy May Trip Over Mad Cow, Tepid Sales*, N.Y. Post, Dec. 29, 2003; Bill Barnhart, *Mad Cow Case to Affect Economy*, Chicago Tribune, Dec. 25, 2003.

[10] Similar federal agricultural commodity promotion and research programs are currently in place for, among other things, dairy products, 7 U.S.C. §§ 4501 *et seq.*, cotton, 7 U.S.C. §§ 2101 *et seq.*, eggs, 7 U.S.C. §§ 2701 *et seq.*, pork, 7 U.S.C. §§ 4801 *et seq.*, soybeans, 7 U.S.C. §§ 6301 *et seq.*, honey, 7 U.S.C. §§ 4601 *et seq.*, and popcorn, 7 U.S.C. §§ 7481 *et seq.*

agricultural commodity promotion and research programs. *See, e.g.*, *Michigan Pork Producers Ass'n, Inc.* v. *Veneman*, 348 F.3d 157 (2003) (pork), *petition for cert. filed* (Jan. 20, 2004) (No. 03-1043); *Pelts & Skins, L.L.C.* v. *Jenkins*, 259 F. Supp. 2d 482 (2003) (alligator products); *In re Washington State Apple Advertising Comm'n*, 257 F. Supp. 2d 1290 (2003) (apples); *Avocados Plus Inc.* v. *Veneman*, No. 02-1798 (D.D.C. Feb. 14, 2003), *vacated*, (D.D.C. Apr. 14, 2003) (avocados); *Charter* v. *USDA*, 230 F. Supp. 2d 1121 (2002) (beef).

Decisions in these cases reveal profound disarray and confusion among courts in this important area of constitutional law. For example, whereas the District Court below held that the generic advertising conducted under the Beef Act is *not* government speech, concluding that the evidence in this case demonstrates that USDA's oversight is merely "ministerial," App. 55a, the district court in *Charter* held—*on essentially the same record*[11]—that the advertising under the Beef Act *is* government speech, concluding that "[b]y no means is the government's control over the checkoff-funded program *pro forma*." 230 F. Supp. 2d at 1138. The Eighth Circuit below, of course, never reached the issue, holding instead, as a categorical matter, that the government speech doctrine does not even apply in this case because it involves the compelled funding of speech. *See supra* at 11-12; App. 15a-19a.

The Sixth Circuit, in *Michigan Pork Producers*, did not follow the Eighth Circuit's approach, but instead considered whether the generic advertising at issue was government speech. 348 F.3d at 161-162. In further contrast to the Eighth Circuit—which concluded that, "had the government relied upon *Central Hudson* in *United Foods*, the Supreme Court would have adapted the *Central Hudson* test to the

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[11] The parties in *Charter* stipulated to the submission of the case for decision on the summary judgment record in that case and the trial transcript in this case. *See* 230 F. Supp. 2d at 1123.

circumstances of that case," App. 21a—the Sixth Circuit, relying on *Wileman*, found *Central Hudson* "inapplicable" to cases involving the compelled funding of speech. 348 F.3d at 163. The *Charter* court also concluded that *Central Hudson* "does not apply" in this context. 230 F. Supp. 2d at 1141. The court held, however, that, "assuming the commercial speech test does control this case, the checkoff-funded program passes constitutional muster." *Id.* In so holding, the court applied the straightforward criteria of *Central Hudson*, not the bizarre concoction of *Central Hudson* and other precedents applied by the Eighth Circuit below. *See supra* at 12-14; App. 22a-28a.

This Court's guidance on the application of the First Amendment in this important regulatory context is clearly needed. Such litigation and confusion will continue to proliferate until this Court more definitively resolves the constitutionality of these programs. This case provides a timely and ideal vehicle for the Court to resolve the government speech and other issues left open by *United Foods*. *See e.g.*, *Michigan Pork Producers*, 348 F.3d at 161 ("the Court has yet to consider whether programs similar in nature to the Pork Checkoff Program constitute governmental speech"); *Charter*, 230 F. Supp. 2d at 1130 ("It is obvious that both *Wileman Brothers* and *United Foods* were decided without considering whether the agricultural marketing programs amounted to government speech."). The Court should thus grant certiorari to decide whether the Eighth Circuit properly held that no valid constitutional basis exists to uphold an Act of Congress deemed "vital" to "the general economy of the Nation." 7 U.S.C. § 2901(a)(4).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment reversed.

Respectfully submitted,

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